



U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536

File: EAC 00 262 51308

Office: VERMONT SERVICE CENTER

Date:

IN RE: Petitioner:  
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The employment-based preference visa petition was denied by the Director, Vermont Service Center. The director's decision to deny the petition was affirmed by the Associate Commissioner for Examinations on appeal. The matter is now before the Associate Commissioner on a motion to reopen. The motion will be granted. The petition will be denied.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition. The Associate Commissioner affirmed this determination on appeal.

On motion, counsel submits a brief and additional documentation.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is \$11.47 per hour or \$23,857.60 per annum.

The Associate Commissioner affirmed the director's decision to deny the petition, noting that the petitioner had not submitted evidence

of its ability to pay the proffered wage as of the filing date of the petition.

On motion, counsel argues that:

Armand's Chicago Pizza is a national corporation which provides a franchise to outlets throughout the United States who prove themselves financially strong enough to meet the corporations standards for franchisees. The Petitioner in this matter, Ron Ryan Corporation, trading as Armand's Chicago Pizzeria, is one such franchise. The various tax returns provided for that petitioner have shown, as noted in page three of the opinion in this matter, show that for tax years 1998 and 1999, the Petitioner had profits of almost Seven Hundred Thousand Dollars each year, with salaries paid to employees of well over Three Hundred Thousand Dollars each year. This would appear to show that the Petitioner not only had the ability to pay, but did actually pay, the proffered wage.

The fact that current liabilities stated on Schedule L of the Return in question came close to the current assets and cash on hand does not take into consideration that this is a corporate tax year end number, and does not account for profits and income in the next month, quarter, etc.

Counsel further argues that:

3. With regard to the problem with identification of the alien worker in this matter, additional documents are files herewith, including a birth certificate for the alien, with a translation; two diplomas from Honduras, with translations; a copy of the alien's marriage certificate concerning her marriage to one Valentin [REDACTED] to whom she is still married, although she has not lived with him for a number of years. He remains living in Honduras at this time; an updated letter from the owner of the Petitioner, Ron Ryan Corporation, and copies of birth certificates for the alien's children, [REDACTED] who live with their father in Honduras.

4. The 1998 tax return for the alien does show an address on [REDACTED] which was the address of the alien in that tax year. The 1999 and 2000 returns show her current address [REDACTED]

[REDACTED] Unfortunately, the employer does not mail its W-2 forms to the employees, but just hands them to workers at the job. The payroll department did not receive notice of this alien's change

of address, which caused the W-2 forms for 1999 and 2000 to retain the old address, but which were submitted with returns bearing the correct address for the alien employee.

Counsel's argument is not persuasive. Counsel has failed to adequately refute the Associate Commissioner's finding that the submitted evidence of payment to the beneficiary is insufficient. Simply going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. See Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

**ORDER:** The Associate Commissioner's decision of March 15, 2002, is affirmed. The petition is denied.